Supreme Court, U.S.
FILED
MAR 1 1999
CLERK

No. 98-1026

In the Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF OREGON

HARDY MYERS
Attorney General of Oregon
DAVID SCHUMAN
Deputy Attorney General
*MICHAEL D. REYNOLDS
Solicitor General
STEPHANIE L. STRIFFLER
Special Counsel to the
Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Amicus Curiae

*Counsel of Record

18pp

TABLE OF CONTENTS

Interest of the Amicus Curiae 1

Reasons for Granting the Writ 7

I. The Court should grant the writ to clarify whether there is a treaty right to species not fished for at treaty times. 8

II. The Court should grant the writ to clarify the role of equitable factors in treaty fishing allocations. 14

Conclusion 15

TABLE OF AUTHORITIES

Cases Cited

Midwater Trawlers Cooperative et al. v. United States Department of Commerce et al., Civ. No. 96-6170-TC, C96-1808R, Ninth Cir. No. 97-36008 5

United States v. Oregon, 699 F. Supp. 1456 (1988), *affirmed* 913 F.2d 576 (9th Cir. 1990), *cert. den. sub. nom* Makah Indian Tribe v. United States, 501 U.S. 1250 (1991).....1,6

United States v. Oregon, 913 F.2d 576 (9th Cir. 1990) 2

United States v. Washington, 384 F. Supp. 312 (W.D. Wa. 1974) ("Boldt I").....8,9,10,11

United States v. Washington, 459 F. Supp. 1020 (W.D. Wa. 1978) ("Boldt II") 12

United States v. Washington, No. 96-2 (Order, Nov. 5, 1996) 4

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 657, 679 (1979)..... passim

Statutory Provisions

16 U.S.C. § 1853(a)(2).....5

16 U.S.C. § 1854.....5

Treaty with the Nez Perce, June 11, 1855, 12 Stat. 957 1–2

Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963 2

Treaty with the Umatilla Tribe, June 9, 1855, 12 Stat. 945.....2

Treaty with the Yakamas, June 9, 1955, 12 Stat. 951 1

Administrative Provisions

61 Fed. Reg. 28786 5

61 Fed. Reg. 10303 5

62 Fed. Reg. 700 (Jan. 6, 1997) 5

63 Fed. Reg. 419 (Jan. 6, 1998) 5

Other Authorities

FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982) 1

INTEREST OF THE AMICUS CURIAE

Oregon writes to support the State of Washington and to urge the Court to grant the petition. At issue in this case is the interpretation of treaty language governing tribal off-reservation fishing rights virtually throughout the Pacific Northwest. The treaties at issue here, often referred to as "Stevens treaties" after Governor Isaac Stevens of the Washington Territory, contain essentially identical language concerning off-reservation fishing rights. That language provides that "[t]he right of taking fish at all usual and accustomed grounds and stations is secure . . . in common with all citizens of the Territory." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982), ch. 8 § B3, p. 450 n. 29; *see e.g., United States v. Oregon,* 699 F. Supp. 1456 (1988), *affirmed* 913 F.2d 576 (9th Cir. 1990), *cert. den. sub. nom Makah Indian Tribe v. United States,* 501 U.S. 1250 (1991) (applying treaties to Columbia River salmon). The State of Oregon has an immediate interest in the interpretation of this treaty clause, because allocation of fish under the so-called "Stevens treaties" governs allocations of fish between citizens of Oregon and Indian tribes.[1]

---

[1] *United States v. Oregon* became the forum for allocating the harvest of fish that enter the Columbia River system, while *United States v. Washington* became the forum for allocating fishing rights within the jurisdiction of the State of Washington. *United States v. Oregon*, 913 F.2d 576, 579 (9th Cir. 1990). The parties to *United States v. Oregon* are the States of Oregon, Washington and Idaho and the four Columbia River treaty tribes (Yakama, Nez Perce, Umatilla and Warm Springs). *Id.* The Stevens treaties adjudicated there are the Treaty with the Yakamas, June 9, 1955, 12 Stat. 951; Treaty with the Nez Perce, June 11, 1855, 12 Stat.

In two important and far-reaching respects, the Ninth Circuit's interpretation of that treaty language takes a different turn from the principles for determining treaty fishing rights previously established by this Court and lower courts. These earlier cases defined the nature and scope of treaty fishing rights using evidence of historical tribal fisheries. The Ninth Circuit in the present case took a different direction. The court did not require evidence of historical tribal fisheries, finding instead a treaty entitlement to an exclusive share of species of fish never fished for at treaty times. These earlier cases also indicate that allocations between treaty and non-treaty fisheries be made taking into account equitable factors. The Ninth Circuit failed to follow this guidance. The court instead found the tribes entitled to an automatic fifty-fifty division without any consideration of the equities involved in such an allocation.

The significance of the Ninth Circuit's interpretation of the treaty language for Oregon's fishing industry is perhaps best illustrated by a tribal allocation dispute in Oregon's newly developed Pacific whiting fishery. In an effort to maintain Oregon's fishing industry in a time of declining resources, the State of Oregon (including state agencies and Oregon State University) and the private fishing industry engaged in research over the last twenty-five years aimed at development of a shore-based whiting processing industry.

957, Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963; Treaty with the Umatilla Tribe, June 9, 1855, 12 Stat. 945.

Whiting, which masses in schools off the Pacific Coast of North America from spring to early autumn, had not previously been domestically harvested or marketed in quantity. Nor to the state's knowledge had there ever been any historic tribal whiting fishery. Pacific whiting are subject to a myxosporidean parasite, which migrates from the stomach of the fish into the flesh after death. At that point, the parasite secretes an enzyme that causes the flesh to become mushy within a matter of hours, making the fish unmarketable and practically inedible. Historically it has been impossible to bring the fish to shore without this deterioration. However, in the last few years, the research to which the State of Oregon has contributed has resulted in improved methods for handling whiting, including methods for offshore refrigeration and processing, and the uses of protease inhibitors to prevent degradation.

State-funded research has also improved and expanded the market for whiting by exploring new options for marketable forms of whiting products. Most of the Pacific whiting catch has found a new market in the processing of surimi, from which imitation crabmeat and other seafood products are made. The Oregon Economic Development Department has also underwritten and guaranteed several million dollars worth of loans made to Oregon whiting processors.

As of 1995, these state-funded efforts totalled $33 million. The private sector investment in fishing vessels, gear, processing plants, distribution and marketing represented many

more millions of dollars. By 1995, these efforts had facilitated the establishment of a shore-based whiting processing industry on the Oregon coast, with whiting comprising approximately fifty percent of all landed seafood in Oregon. Between 1994 and 1997, the industry generated an annual average of $35.6 million in personal income.

Now, because of the ruling in this case, Oregon citizens, and the industry that invested millions of dollars into the technology for processing whiting into a marketable product, have been displaced from part of the fishery. In 1996, the Makah Indian Tribe filed a "request for determination" in another subproceeding of *United States v. Washington,* No. 96-2, seeking a determination of the tribe's treaty entitlement to an exclusive allocation of Pacific whiting. The court granted summary judgment to the tribe, concluding that the district court's ruling in the case now before this Court was binding. The district court accordingly found that the Makah need make no showing that they fished for whiting at treaty times. (Order, Nov. 5, 1996.) The subproceeding is now held in abeyance because the legal issues of treaty interpretation and equitable allocation are before this Court in Washington's petition.

Also that year, the Secretary of Commerce published a rule allocating to the Makah Tribe for the first time an exclusive share of the Pacific whiting catch.[2] The Secretary did so

---

[2] The Pacific Fishery Management Council prepares fishery management plans for certain fisheries within the exclusive economic zone sea-

because whiting can be taken in the Tribe's usual and accustomed fishing grounds where prior courts had found that the Makah historically fished for salmon, halibut, and certain other species. The Secretary therefore believed, "the Makahs have a treaty right to harvest one-half of the harvestable surplus of the Pacific whiting stocks found in their [usual and accustomed] area." 61 Fed. Reg. 10303 (proposed rule). In reaching that conclusion, the Secretary specifically cited the district court's opinion in this case.[3] Since the original rule, the Secretary has continued to base whiting allocations for the Makah on the same reasoning. 62 Fed. Reg. 700, 718 (Jan. 6, 1997)[4]; 63 Fed. Reg. 419, 442 (Jan. 6, 1998).[5] The current

---

ward of the States of Washington, Oregon and California. The Secretary has authority to approve such plans, considering "Indian treaty fishing rights, if any." 16 U.S.C. § 1853(a)(2); 16 U.S.C. § 1854.

[3] "In the shellfish subproceeding (89-3) in *United States v. Washington,* the court found that the right to take fish that was reserved in the treaties must be read to apply to all fish, without any species limitation." 61 Fed. Reg. 10303; *see also* 61 Fed. Reg. 28786, 28788 (final rule).

[4] "The [Pacific Fishery Management] Council's recommendation of no allocation is not acceptable because federal district court Judge Rafeedie held that tribes have a right to all fish in their usual and accustomed fishing areas, with no species limitation."

[5] The Secretary's whiting allocation rule gave rise to litigation filed in the United States District Court for the District of Oregon, which was transferred to the Western District of Washington, and is now on appeal to the Ninth Circuit. *Midwater Trawlers Cooperative et al. v. United States Department of Commerce et al.,* Civ. No. 96-6170-TC, C96-1808R, Ninth Cir. No. 97-36008, submitted Sept. 17, 1998. The district court dismissed the case for procedural reasons and did not reach the merits of the legal propriety of the Secretary's determination of the Makah's treaty right. The issue could arise again if there is a remand.

allocation to the Makah is 25,000 metric tons (55 million pounds) of whiting. The outcome of this case, therefore, has a critical impact on future whiting allocations.

Oregon's interest in this case extends beyond its interest in the whiting fishery, because the court's interpretation of the treaty creates uncertainty as to proper allocation of any number of species that were not fished for in at usual and accustomed grounds and stations at treaty times. For instance, the Columbia River contains species that were not fished for at treaty times, and which could form the basis for disputes in the context of *United States v. Oregon.* As another example, in the usual and accustomed fishing grounds previously adjudicated for salmon off the coast of Oregon and Washington are found over 80 species of fish, located down to depths of 1,000 fathoms. The Oregon coast fishing communities of Astoria and Newport depend on shrimp, crab and groundfish off the coast of Washington, where are located species of shellfish never fished for at treaty times. Also, in these waters are species of groundfish besides whiting, such as the thornyhead rockfish, that were not fished for at treaty times. Under the court's analysis in this case, once the usual and accustomed fishing grounds for anadromous fish have been determined, treaty tribes may be entitled to an exclusive share of any and all other species that may be found there.

Finally, this case may have ramifications broader than the interpretation of the fishing clauses of the Stevens treaties. Even where tribal fishing or hunting rights arise from differ-

ent treaty language, this case provides a precedent for ignoring the role of historic Indian practices in determining treaty rights, as well as a precedent for ignoring the role of equity in determining allocation.

REASONS FOR GRANTING THE WRIT

This Court has previously recognized the importance of the treaty rights at issue here, as is evidenced by the fact that on seven prior occasions it has granted certiorari to interpret the treaty language. *See Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 657, 679 (1979) ("*Fishing Vessel*")(detailing six prior occasions). Review is necessary once again, this time to clarify an issue of increasing practical significance: whether the treaties were intended to grant the tribes an automatic share of fisheries unfished for or even unknown when the treaties were executed.

This ruling affects many others beyond the Washington commercial fishers, shellfish growers and property owners whose rights are directly adjudicated here. As the preceding discussion shows, this case has had a significant and immediate effect on Oregon's Pacific whiting industry and those who have invested in its development. Yet the whiting situation presents a mere illustration of the potentially far broader impact of the ruling. As natural resources face more threats and pressures, governments and private interests are likely to seek to invest in new processes and markets for previously undeveloped fish resources. Under the ruling in this case, these

resources will be subject to an automatic exclusive tribal share, regardless of the tribes' historical dependence on the resource and regardless of the contribution of others to the availability of the resource.

I. The Court should grant the writ to clarify whether there is a treaty right to species not fished for at treaty times.

A review of the history of the *United States v. Washington* litigation demonstrates how the courts have interpreted the treaty term "the right of taking fish at all usual and accustomed grounds and stations" in light of the tribes' actual historical practices. In 1974, Judge Boldt issued his comprehensive opinion, adjudicating the treaty rights of fourteen tribes to anadromous fish (salmon and steelhead) under the Stevens treaties. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wa. 1974)(*"Boldt I"*). This decision was ultimately reviewed by this Court in the "*Fishing Vessel*" case. At issue in this Court was whether the tribes had negotiated to reserve an opportunity to try to catch fish, or whether they had negotiated to reserve an absolute right to "take" a share of the available fish.

As is shown below, this Court's analysis, as well as that of the district court, determined the treaty right by considering evidence of what the Indians actually did, including which Indians fished for which species of fish, and where. Yet in resolving the question presented for shellfish species, the Ninth Circuit took a different approach, finding such historical evidence unnecessary.

First, in his almost 100-page-long opinion in *Boldt I*, Judge Boldt thoroughly considered the history of the Stevens treaty negotiations and concurrent tribal practices. Judge Boldt began by noting the parties "exhaustive research in anthropology, biology, fishery management and other fields of expertise." 384 F. Supp. at 328. With respect to each tribe, the court made findings regarding the treaty time fishing areas and fishing techniques as to anadromous fish. *Id.* at 359–82; *see, e.g.*, 363–65 (findings regarding Makah Tribe).

The court paid careful attention to the pretreaty dependence of these tribes on salmon and other anadromous fish. *Id.* at 350. The court found that the taking of salmon and steelhead from the tribes' usual and accustomed places constituted "both the means of economic livelihood and the foundation of native culture." *Id.* at 407. These fish, stressed the court, were "vital to the Indian diet, played an important role in their religious life, and constituted a major element of their trade and economy." *Id.* at 350. The court described the "first-salmon ceremony," a religious rite engaged in to ensure continued return of salmon. *Id.* at 351.

The Indians' historical dependence on anadromous fish played an important role in the treaty negotiations. A primary concern of the Indians "whose way of life was so heavily dependent upon harvesting anadromous fish" was that they have freedom to gather food, particularly salmon, at their usual and accustomed fishing places. *Id.* at 355. The record showed that the treaty Indians insisted upon retaining the

exercise of their right to fish as necessary to their survival. *Id.* at 334. Further, the record of treaty negotiations revealed no discussions indicating the Indians were told that their "existing fishing activities" would be restricted or impaired by the treaty. *Id.* at 357.

After detailing these extensive findings, the court concluded that the tribes had bargained for a right to "share equally" in the harvestable fish at their usual and accustomed fishing grounds and stations. *Id.* at 343. The court made factual findings to determine the location of the various "usual and accustomed" grounds. In order to make these findings, the court reviewed the history of each tribe's fishing practices at treaty time. That history included species fished for, the locations, and the tribes that engaged in the activity.

When the Supreme Court reviewed *Boldt I,* it focused as well on the tribes' historical practices, both in determining the understanding of the tribes in the treaty negotiations and in setting a framework for determining the scope of the rights. In affirming the district court's conclusion that the treaty was intended to secure the tribes a right to "share equally" in the harvestable fish at their usual and accustomed fishing grounds and stations, this Court construed the treaty in light of what the tribes' treaty time anadromous fishing activities had meant to them historically.

Quoting *Boldt I,* the Court emphasized the dependence of the various tribes on anadromous fish for food and commercial purposes. *Fishing Vessel*, 443 U.S. at 664–65. In

that context, the Court reviewed the history of treaty negotiations, repeatedly referencing the tribes' insistence on continuing to support themselves by fishing in the same manner as they had historically. The Court cited contemporaneous evidence that the treaty negotiators recognized the importance of the fisheries to the Indians, and quoted a statement of Governor Stevens that: "It never could have been the intention of Congress that Indians should be excluded from their ancient fisheries . . ." *Id.* at 666 n. 9. In addition, the Court noted the district court's findings regarding the Yakama Tribe's understanding that they would be able to continue fishing for the same species of fish:

> At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising.

Id. at 667, quoting *Boldt I*, 384 F. Supp. at 381. The Court referenced similar findings with respect to the Makah. *Id.* at 668. The Court also quoted Judge Boldt's finding that there was no record indicating that the Indians were told that their "existing fishing activities" would be impaired by the treaty. *Id.* n. 12, *quoting Boldt I,* 384 F. Supp. at 357.

The tasks that remained for Judge Boldt following the *Fishing Vessel* decision were defined in part by the need for the tribes to establish what their treaty time fishing activities had been. In *Boldt I*, the court had addressed only salmon and other anadromous fish. Thus, among other issues to be deter-

mined after this Court's review of *Boldt I* in *"Fishing Vessel"* was the treaty right to other, nonanadromous, fish species. The district court had maintained continuing jurisdiction to resolve this issue and other treaty fishing issues, including the location of other usual and accustomed fishing grounds, and had set a process for "requests for determination" of such matters. 384 F. Supp. at 419. After this Court's *Fishing Vessel* decision, Judge Boldt further specified the process for determining treaty rights to these other species of fish. *United States v. Washington*, 459 F. Supp. 1020 (W.D. Wa. 1978) ("*Boldt II*"). The court focused on which tribes fished for which species of nonanadromous fish and where:

> In order to be entitled to exercise off-reservation treaty fishing rights to nonanadromous fish and shellfish, any tribe party to this case shall, prior to any attempt to exercise such rights, present prima facie evidence and arguments supporting its claim to treaty entitlements to such nonanadromous fish and shellfish upon which the court may make a preliminary determination as to the tribe's entitlement to such species, pending final determination of tribal treaty-right entitlement to nonanadromous fish and shellfish.

Boldt II, 459 F. Supp. at 1037 ("Paragraph G"). Among the matters as to which the court was to maintain continuing jurisdiction were "[t]he species taken at treaty times, where (usual and accustomed grounds), and by what tribes (who are entitled to exercise treaty entitlement)." *Id.* at 1038. That the court set out this process implies that it had concluded that, for each tribe to establish its treaty fishing right to species

other than salmon, the tribe had to do more than simply rely on the "usual and accustomed" fishing grounds adjudicated for salmon. The only point of the process Judge Boldt described would be to establish "usual and accustomed" grounds that were different for nonanadromous fish.

The conclusion that the tribe could not simply rely on "usual and accustomed" fishing grounds adjudicated for salmon in establishing treaty rights to nonanadromous fish is consistent with the treaty language. That language itself references the tribe's historical practices at "usual and accustomed" places. And consistent with this Court's emphasis on the tribes' "ancient fisheries" and "existing fishing practices," the purpose of defining usual and accustomed grounds is to pinpoint the location of a treaty time activity, the activity for which the treaty reserves a right. It would not be enough simply to show that some tribe fished at a particular place; rather each tribe must show what that tribe fished for and where.

In the instant case, the Ninth Circuit failed to follow the direction indicated in *Fishing Vessel* and the *Boldt* decisions. Rather than basing the location of "usual and accustomed" fishing grounds for shellfish on treaty time fishing activities, the court instead presumed that all fishing activities were defined by the previously adjudicated usual and accustomed fishing grounds for other species. The Court should grant certiorari to clarify the role of historical treaty fishing practices in the determination of treaty fishing rights.

II. The Court should grant the writ to clarify the role of equitable factors in treaty fishing allocations.

The Ninth Circuit departed from this Court's guidance in a second way. Once this Court determined that the tribes were entitled to a "share" of the fish, the court did not simply apportion the fish on a fifty-fifty basis. The Court agreed with the *Boldt I* decision that "in common with" meant a maximum figure of fifty percent, depending the tribes' historical and current circumstances. The Court emphasized the district court's finding that at treaty time the tribes had depended heavily on these kinds of fish as a source of food, commerce and cultural cohesion. 443 U.S. at 686. Only based on that finding had the court determined that the tribes' present-day needs should be met. *Id.* Indeed, fifty percent was a maximum figure: "Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood . . ." *Id.* Thus, this Court stressed that it was not guaranteeing the tribes a specified percentage of the fish. *Id.* at 686 n. 27.

Yet—other than considering whether an allocation might be needed by the tribes to maintain a "moderate living standard" as discussed in *Fishing Vessel*—the Ninth Circuit failed to consider treaty time practices and other equitable factors in determining the tribes' "fair share." Contrary to the guidance of *Fishing Vessel,* the Ninth Circuit made an automatic fifty-fifty allocation between tribal and non-tribal fisheries. As

noted above, this mechanical approach has been adopted with respect to the Pacific whiting fishery, without consideration of the extent of treaty time dependence on the whiting resource or the contribution of non-Indians to developing the ability to harvest the resource in the first place. The Court should grant review to consider the role of such equitable factors in treaty fishing allocations.

CONCLUSION

For the foregoing reasons, this Court should grant the writ.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
DAVID SCHUMAN
Deputy Attorney General
MICHAEL D. REYNOLDS
Solicitor General
STEPHANIE L. STRIFFLER
Special Counsel to the
Attorney General
Counsel for Amicus Curiae

March 1, 1999